IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 224.

BOARD OF TRADE OF THE CITY OF CHICAGO,
Petitioner,
vs.
CHRISTIE GRAIN & STOCK COMPANY and C. C. CHRISTIE,
Respondents.

Certiorari to Circuit Court of Appeals for the Eighth Circuit.

STATEMENT.

The general question in this case is, whether a commercial exchange, like the Chicago Board of Trade, may enjoin the theft of its market quotations while permitting a limited distribution thereof.

The invention of the instrument known as the "ticker" shortly before 1880 gave rise to the present facilities for disseminating market news, whereby every change in the prices of commodities on a commercial exchange can be electrically transmitted and displayed with such promptness, that the making

of the prices upon the exchange and their display in the offices of dealers throughout the country are practically simultaneous.

For some years prior to August, 1900, petitioner allowed the telegraph companies, without charge, to collect its quotations, and imposed no restrictions upon their sale. This and similar conduct of other like commercial exchanges brought into existence the bucket-shops.

A bucket-shop is a place, where its proprietor posts upon a blackboard market quotations of one or more of the leading commercial exchanges, and stands ready to accept from all comers bets upon the course of such blackboard prices, each "trade" being opened at the last quotation then on the blackboard, and being closed at the last quotation on the blackboard at the time of closing. A margin is exacted from each customer, and when this is exhausted according to the blackboard price, the so-called trade is at an end. The keeper takes out of each trade an arbitrary profit, miscalled a "commission," which enables him to profitably assume the risk incident to the fluctuations of the market, such risk being present for him only to the extent that the so-called purchases of his customers exceed in the aggregate their so-called sales, or *vice versa*. The market quotations are thus essential to the existence of all bucket-shops.

By reason of this indiscriminate distribution of its quotations petitioner, about August 1, 1900, adopted a plan to prevent their use in bucket-shops and to derive a revenue from its quotations. To that end it exacted from the four telegraph companies, to which

it thereafter furnished its quotations, contracts, in which they severally agreed that they would not sell such quotations to any bucket-shop, and would exact from every person, to whom they sold them, a written agreement that he would neither use them in conducting a bucket-shop, nor allow them to be taken from his office. (Rec., 10-18, 239, 243.)

Under these contracts the telegraph companies also agreed to pay, and have since then paid, to petitioner for the quotations more than $30,000 per year, and petitioner on its part agreed to take all reasonable steps to prevent persons from purloining such quotations. (Rec., 16.)

Being thus unable to purchase these quotations from the telegraph companies, many bucket-shops (and others acting in their interest) at once commenced to systematically steal the quotations by tapping telegraph wires or otherwise, and thereby an illicit trade therein was inaugurated and has since been maintained, which has to a large extent defeated petitioner's purpose to prevent the use by bucket-shops of its quotations, and threatens also to endanger its revenue therefrom.

This caused petitioner to institute numerous suits in equity (of which this is one) in the federal courts of the central west. Most of these cases are still pending and are awaiting the decision of this case.

The suit at bar was brought against these respondents at Kansas City. It is based upon the theory that the quotations are a species of property, which equity will protect by injunction. The bill sets out the contracts between petitioner

and the telegraph companies. It avers that the respondents have not acquired the quotations from these telegraph companies, but were purloining and using the same at their place of business at Kansas City. It prays that they be enjoined from doing so.

Respondents' answer denied many of the allegations of the bill, and averred that the quotations grew out of gambling transactions in petitioner's exchange hall, and that by reason thereof petitioner was keeping a bucket-shop, contrary to the criminal statute of Illinois (the prohibiting sections of which are set out on pages 993, 994 of this record) and by reason thereof relief should be denied.

Exceptions to this portion of the answer having been overruled (Rec., 58, 86) and much proof taken (mostly by respondents) touching the character of these transactions, Judge Hook decided all questions against the respondents and granted petitioner first an interlocutory, and subsequently a permanent, injunction. (See opinion, Rec., 956, 972).

Respondents perfected appeals from the interlocutory order and final decree to the Circuit Court of Appeals of the Eighth Circuit, which were consolidated (Rec., 1015), and that court decided that these transactions for future delivery were "in all essentials gambling transactions," and that by reason thereof petitioner violated this criminal statute of Illinois, and did not come into court with clean hands, nor for a lawful purpose, and reversed the decree with instructions to dismiss the bill upon the merits (see opinion, Rec., 990). Thereupon this writ of *certiorari* issued.

In another similar suit in Indiana, the Circuit Court

of Appeals of the *Seventh Circuit,* upon (to all intents and purposes) the same evidence, declined to follow this decision of the Circuit Court of Appeals in the case at bar, and directed a decree for petitioner. In that case a *certiorari* also issued, and it stands as No. 280 upon the present docket of this court.

A recital of the minor facts arising on this record will be deferred until the consideration of the questions to which they relate.

The questions that arise on this record are

(1) Is it, in point of law, a good defense to this suit, that most of the transactions, out of which these quotations arise, are gambling transactions?

(2) If so, is, in point of fact, most of such trading gambling?

(3) If so, is petitioner so responsible therefor that it should be denied the right to maintain this suit?

(4) Are these quotations *property* which a court of equity will protect by injunction?

(5) Is the contract between the petitioner and the telegraph companies respecting these quotations illegal?

ARGUMENT.

I.

IS IT, IN POINT OF LAW, A GOOD DEFENSE TO THIS SUIT THAT MOST OF THE TRANSACTIONS, OUT OF WHICH THESE QUOTATIONS ARISE, ARE GAMBLING TRANSACTIONS?

This suit was brought in *Missouri*, and was dismissed by the Circuit Court of Appeals solely by reason of a supposed violation by petitioner of a criminal statute of *Illinois*. Thus the question here is, whether the violation of a criminal statute of one state debars a plaintiff from maintaining a suit to protect his property in a federal court in another.

It is not the province of a court—state or federal—in one state to thus give effect to a criminal statute of another. It is well settled that "the penal laws of a country do not reach, in their effect, beyond the jurisdiction where they are established." In

Commonwealth v. *Green*, 17 Mass., 514, 540, it was held that the conviction of an infamous crime in another state did not render a witness incompetent, Chief Justice Parker saying:

"To refuse a man the right to be a witness on account of a conviction in another country, would be to suffer that conviction to have force here, and, in some measure, to carry it into execution."

This court approved this case and held the same way in

Logan v. *United States*, 144 U. S., 263, 303.

Why should an infraction of a foreign criminal statute incapacitate a party, when it does not a witness?

State v. *Pelican Ins. Co.*, 127 U. S., 265, 289,

where this court said:

"By the law of England and of the United States, the penal laws of a country do not reach beyond its own territory, except when extended by express treaty or statute to offenses committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts of another country."

The Antelope, 10 Wheat., 66, 123,

where Chief Justice Marshall said:

"The courts of no country execute the penal laws of another."

Folliott v. *Ogden*, 1 H. Blackst., 123, 135,

where it was held that a foreign attainder depriving one of his property did not prevent his suing on a bond in England, as "the penal laws of foreign countries are strictly local."

The Circuit Court of Appeals held that, because petitioner was violating a criminal statute of Illinois by maintaining at Chicago an exchange hall, where this market news originates, it did not come into the court in Missouri "with clean hands." But, if this clean-hands doctrine were otherwise applicable, violations of a penal statute in Illinois should not make a complainant's hands unclean in a Missouri court; for this would give to such statute an extra territorial effect.

But if this suit had been brought—as some of these suits have—in a federal court in Illinois, the result would be the same. Crime and its punishment are in this country creatures of statute. The penalties are such only as the particular statute creates. A depriva-

tion of the right to protect one's property by resorting to the civil courts is not, except in rare cases, and not in the particular statute under consideration, one of these penalties.

So, the enforcement of criminal statutes in Illinois, as elsewhere, is confided to certain criminal courts. It is not the function of courts of equity of Illinois—much less of federal courts of equity sitting there—to enforce criminal statutes by denying a plaintiff relief, merely because he is a criminal.

Again, all misconduct, even though criminal, by a plaintiff will not defeat his suit. To do so the misconduct must, within the well-defined limitations of the clean-hands doctrine, have been a wrong done to the defendant himself, and must have been in regard to the subject-matter in litigation.

Fuller v. *Berger*, 56 C. C. A., 588, 120 Fed., 274,

where the circuit Court of Appeals (7th Cir.) said:

"Equity is not concerned with the general morals of a complainant; the taint that is regarded must affect the particular rights asserted in his suit. * * * If the defendant can do no more than show that the complainant has committed some legal or moral offense, *which affects the defendant only as it does the public at large*, the court must grant the equitable remedy and leave the punishment of the offender to other forums. * * * Against this, appellees establish that appellant has been misusing the patented device. But how does this concern appellees more or differently than it does others?"

In case No. 280 on this term's docket, the same court (130 Fed., 507), reaffirmed this principle, and said:

"In this case the appellees, citizens of Indiana, have

never had any dealings with appellant respecting the quotations; they have not been misled or deceived by appellant in any way; and they certainly are no more concerned with or affected by appellant's violations of the common law or of the penal laws of Illinois than the general public."

Other authorities to the same effect are:

City of Chicago v. *Stock Yards*, 164 Ill., 224-238.

Bateman v. *Fargason*, 4 Fed., 32.

Ansley v. *Wilson*, 50 Ga., 421.

Langdon v. *Templeton*, 66 Vt., 173.

1 Pom. Eq., Sec. 399.

Petitioner's misconduct, if any, respecting the transactions upon its exchange, prejudicially *affects these respondents only as it does the public at large.*

Again the general dissemination of these quotations is conceded to be highly beneficial to legitimate commerce. Respondents' answer so admits (Rec., 63, 64), and respondent Christie so testified (Rec., 522, 524). So the Illinois Supreme Court has also held. (*Stock Exchange* v. *Board of Trade*, 127 Ill., 153.)

So, then, petitioner's conduct with respect to the quotations, is not at all reprehensible. It gives them to all persons desiring them for lawful purposes (See contract, Rec., 10, 18), and only withholds them, as it lawfully may, from bucket-shops. Hence, the alleged misconduct of petitioner does not, within the above rule, relate to the subject-matter of this suit—the quotations.

The Circuit Court of Appeals (Rec., 1001) does say that these quotations are "furnished by the Board of

Trade and sent out over the lines of the Telegraph Companies as a means of encouraging speculation in futures and in gambling upon the rise and fall of the market." There is, however, neither in the pleadings nor in the evidence any support for this statement. The large revenue derived by petitioner is a sufficient motive for its distributing these quotations, and is the only one shown by this record. Why then infer without proof an improper motive?

The court might, with equal propriety, decline to entertain a suit by petitioner to protect its ownership of its exchange building, on the ground that it permits gambling transactions there in violation of the criminal statute of Illinois. The building is much more responsible for, and thus more nearly related to, these transactions than are the quotations. This is in reality adding to the statutory punishment the deprivation of one of the fundamental rights of a property owner. The clean-hands doctrine does not go to this length.

There is, it is true, quite apart from this clean-hands doctrine, a principle that relief is in some cases denied from considerations of public policy. Thus, the courts have refused protection to a trade name, that is calculated to deceive the public. On the other hand, the courts in some cases, *grant* relief solely from considerations of public policy, as, for instance, in some cases where the parties are *in pari delicto*. (2 Pom. Eq., 941.) Here equity does not concern itself with either party, but considers only the public welfare, and the determining question is, does public policy require the withholding or granting of relief.

But this principle does not justify turning petitioner out of court, because the quotations are neither fictitious nor hurtful to the public. The public welfare will be best advanced by having petitioner succeed in its efforts to prevent the misuse of its quotations in bucket-shops. This the *granting* of relief would accomplish.

On the other hand, its present revenue from its quotations is not essential to the maintenance of petitioner's exchange. It neither derived revenue from, nor restricted the use of, its quotations prior to August 1, 1900. Yet for many years before that date, this same future trading took place on its exchange. Petitioner's failure in this litigation could not then reasonably do more than restore the situation existing prior to August 1, 1900. How, then, would the public be benefited by *denying* petitioner relief?

Furthermore, petitioner does not violate the Illinois bucket-shop statute (the material sections of which are set out in the opinion of the Circuit Court of Appeals), because it does not apply to commercial exchanges.

This statute in this respect has never been construed by the Illinois courts. *Soby* v. *People,* 134 Ill., 66, referred to at length in the opinion of the Circuit Court of Appeals had reference only to a *broker's* office. Its language should be confined to its facts. (*Carroll* v. *Lessee,* 16 How., at p. 286.) It does not decide that a commercial exchange is within this statute.

In construing this statute the general public policy of Illinois and its other legislation should be considered. It has been the policy of that state, as of all

commercial states of modern times, to encourage the maintenance of commercial exchanges.

As early as 1849, the great future of the grain trade of the Northwest was foreseen, and the necessity for an exchange in Chicago to facilitate that trade was apparent. In that year the Illinois legislature passed a general statute providing for the incorporation of boards of trade with such powers as are usual in the management and conduct of such institutions. (Gross' Stat. of Ill., p. 116.) The Chicago Board of Trade was incorporated originally under this general act, and continued to exist thereunder until 1859, when its usefulness to the commerce of the state having been demonstrated, the Illinois legislature granted it its present special charter (see exhibit, book of rules), thereby incorporating "the persons now composing the Board of Trade of the City of Chicago" into the present corporation. Sections 4 and 12 of that charter are as follows:

"Sec. 4. The said corporation is hereby authorized to establish such Rules, Regulations and By-Laws for the management of their business, and the mode in which it shall be transacted, as they may think proper."

"Sec. 12. Said corporation shall have no power or authority to do or carry on any business excepting such as is usual in the management of boards of trade or chambers of commerce, or as provided in the foregoing sections of this bill."

Thus the legislature intended by this act to sanction in Chicago an exchange, which would have the powers necessary to enable it to compete successfully with rival exchanges of other cities for the grain trade of the northwest, although it then knew that exchanges give rise to much speculation.

The bucket-shop evil thereafter assumed such large proportions that Illinois, to suppress it, passed in 1887 this bucket-shop statute.

That statute and petitioner's charter are to be construed together. The later act should not be so construed as to nullify the former, unless this clearly was the legislative intent. The first act established a corporation *with perpetual life* and granted it power to maintain an exchange for the transaction of such business as might be "usual in the management of boards of trade or chambers of commerce." The second act contemplates a *forfeiture of the charter* of every corporation within its terms, if the offense therein defined is continued after a first conviction. If the Illinois legislature had, in the Act of 1887, contemplated the termination of the charter of this exchange, which plays so important a part in the commerce of the state, because of speculation in its hall—which, as we shall see, petitioner cannot stop without destroying its efficiency as an exchange—would it not have used language more plainly indicating such a purpose? The nature of the business upon petitioner's exchange in 1887 was, and was then generally known to be, the same as it is now.

Under the practical construction placed upon this statute by the courts and public officials of Illinois it does not apply to commercial exchanges. This statute requires (Sec. 4) that *every* grand jury should be specially charged to investigate violations of this act. Such has been the practice in Chicago ever since its passage; yet never has it occurred to anyone to indict petitioner, nor has the public sentiment ever thought

juries or officials derelict for not doing so. It was not until petitioner entered upon this present litigation that federal courts in other states made the discovery that Illinois had intended, by its bucket-shop statute, to suppress its large commercial exchange as well as bucket-shops.

A similar statute has since 1887 been in force in Missouri. (R. S. Mo., Sec. 2223, 2225.) Yet it has never occurred to those charged with the enforcement of that statute that it applied to the commercial exchanges at St. Louis and Kansas City, where there is the same kind of future trading as upon petitioner's exchange.

Hence, neither by reason of this Illinois statute, nor the general law, does the clean-hands doctrine apply to the case at bar.

But the general question here under discussion has another phase. While the Circuit Court of Appeals, in the case at bar, and Judge Thompson, at Cincinnati (115 Fed., 574), dismissed petitioner's suits under the clean-hands doctrine, and because of petitioner's supposed violation of this Illinois statute, Judge Adams, at St. Louis (121 Fed., 1012), held the character of the transactions, out of which the quotations arise, fatal to petitioner's recovery upon grounds that are entirely apart from the clean-hands doctrine. His decision was (1) that any property right in the quotations is, by the *transactions,* "so tainted with immorality as to preclude resort to a court of equity by complainant for its protection;" and (2) that the quotations have no value nor utility to legitimate commerce, but tend "only to excite the gambling propen-

sities of the public," and that "such is not a species of property which appeals to a court of conscience for protection."

Judge Anderson, in case No. 280, based his decision on the first of these grounds.

The decision of Judge Adams against the utility or value to commerce of these quotations, is based upon the misapprehension that there are two kinds of prices on petitioner's exchange; prices in transactions, where the property is "delivered in fact, or intended to be delivered," which he concedes would be "very valuable to the public," and "promote legitimate trade and commerce," and prices in the wagers, which have "no legitimate tendency to promote the commerce of the country."

But there is not, and in the nature of things could not, be in the same market one price, when a trade is to be closed by actual delivery, and another price for a simultaneous trade in which no delivery is contemplated. Even if the quotations originate from wagers, still, as the Circuit Court of Appeals of the Seventh Circuit said in case No. 280,

"the prices are the same for the transactions that are not wagers, and the quotations sent out show the figures at which honest dealers may secure contracts."

True, the quotations almost wholly represent prices for future delivery, but it is these that the producer and country dealer need to know. They are not concerned with the price of grain actually delivered in Chicago today, but with what the Chicago trader is today willing to pay for their grain when hereafter it shall arrive in Chicago.

Furthermore, the price for *future* delivery indicates to those in the trade the price for *immediate* delivery. The latter always is, except in case of a temporary "corner," the difference between the price for future delivery, and the cost (interest, storage, insurance, etc.), of carrying the property until such delivery time. Whenever there is a variance from this, making it profitable to do so, traders will buy the cash property and sell it for future delivery, or *vice versa*.

Again, the value of this news to legitimate commerce, is, as already stated, shown by respondents' answer and uncontradicted testimony.

Indeed, everyone familiar with this branch of commerce knows that, by the prompt dissemination of these quotations, whereby those engaged in agriculture may know almost immediately the prevailing market values, and thus avoid being overreached in sales of their products, petitioner renders a great public service.

The commercial value of market quotations, as well as of future trading, is emphasized by the recent experience of Germany in yielding to agrarian hostility to commercial exchanges in that empire. Future contracts or "time trading" in grain upon the Berlin Bourse were abolished by statute in 1896. This, it is said, was done against the judgment of the government itself, which recognized the economic advantages of such transactions. Thereupon the brokers dissolved their organization, and withdrew from the Bourse. The sequel is thus told in an instructive article, entitled "The

Berlin Bourse," in the Century Magazine of September, 1903:

"From the moment that the produce section of the Bourse quit their old quarters there was an interregnum in the grain trade of the country; the modern method of produce dealing was virtually abolished. What was the result? The 'Eldest of the Merchants' say in their report for 1900: 'At nearly every one of our meetings, at the beginning of the Bourse interregnum, we had to answer inquiries from the commissary departments of army and navy, from railway managements, municipal administrations, statistical offices, etc., for trustworthy grain prices; but we were only able to answer that we did not know.' The report goes on to show that the only persons getting any advantage from the extinction of the Produce Bourse were the provincial dealers, who charged higher premiums for their increased risks growing out of lack of Berlin quotations. In other words, they paid less to the farmers and asked higher prices from the millers.

The government at once recognized the disadvantages arising for all business interests through the lack of a produce exchange with universally accepted quotations for grain. Hence the Minister of Commerce opened negotiations with the seceded brokers several months after the dissolution of their organization, looking toward re-establishing it. These negotiations were continued for nearly three years before all parties were ready to bury the hatchet, which was done in January, 1900; and the brokers returned with more than half a victory to their old hall. Even the Agrarians had come to recognize the necessity of a produce exchange, for they had bitterly felt the lack of authoritative quotations. True, they still had the liberty to sell their crops in advance of delivery; but they found that they were unable to do this advantageously without quotations recognized by all interests, and without some board of appeal for settling disagreements as to grading. * * *

The Produce Bourse was accordingly reopened on

April 2, 1900. The government conceded to the dealers the right to resume dealings for future delivery and to publish time quotations. * * *

The abolition of the grain futures has been equally disappointing. The position of Berlin as a grain market has been seriously shaken. During the last few years the papers have frequently printed comparative quotations in the leading central markets which prove that German prices have become sluggish in responding to upward movements abroad, and that therefore German farmers are failing to get as quick an advantage from rising prices as those of other lands."

Hence the position of Judge Adams that these quotations should not be protected because they do not "promote legitimate trade and commerce" is not justified by the facts.

Is, then, the other ground of his decision well founded? It is in effect that—regardless of any misconduct of petitioner—this news is so infected or tainted by its source or origin as to become illegal. The illegality of the transactions pollutes the news of them.

The question is reduced to this: Is *market news*, whose dissemination is so helpful to commerce, to be deemed infected with illegality or beyond judicial protection, because the owner of this news maintains an exchange, where parties to most of the *transactions* it records do not contemplate actual delivery? Does the existence of a property right in news depend upon its *source*, rather than the character or utility of the news itself? Would not this subordinate the practical to the purely sentimental? A sufficient answer to these questions is furnished by two decisions of this court.

Brooks v. *Martin*, 2 Wall., 79.

Planters' Bank v. *Union Bank*, 16 Wall., 483, 499.

In the former case, two persons had joined in the purchase of soldiers' claims, which was prohibited by Act of Congress. These illegal *transactions* had resulted in money in the hands of one of the parties, and the other, Martin, filed a bill to get his share of it, and the court sustained the bill. There money, in the case at bar quotations, resulted from alleged illegal transactions. If, as the Circuit Court of Appeals holds, petitioner has violated a statute, so did Martin. If the transactions soiled the hands of petitioner, so did they the hands of Martin. If these transactions taint the quotations, so did the purchase of soldiers' claims taint the money in that case.

In the Planters' Bank case above cited, a party to an illegal sale of confederate bonds was allowed to recover from the party who made it the proceeds of such sale.

Thus, upon no recognized principle of equity, was the Circuit Court of Appeals justified in refusing to protect the property right in these quotations, even if they do grow out of transactions, in which the intention to deliver is wanting, and those transactions occur in a hall kept by petitioner in violation of a criminal statute of Illinois.

II.

ARE THE MOST OF THESE TRADES, WHOSE PRICES THESE QUOTATIONS RECORD, GAMBLING TRANSACTIONS?

This is the *ultimate* question in this case only upon the theory that the quotations can be so tainted by the transactions that a court of equity will not recog-

nize a property right in them. This theory being rejected, the ultimate question is, whether petitioner's responsibility for, and conduct respecting, the transactions upon its exchange are such as to make it an unwelcome suitor. In the solution of this question, however, the character of the transactions necessarily arises, and may properly be first considered.

These quotations are the prices in the "pits" where the trading is almost entirely for future delivery. As to these transactions, the Circuit Court of Appeals says (Rec., 1000) (italics ours):

"There is absolute unanimity in their evidence to the effect, that much the larger part of these transactions were deals wherein it was not *expected or understood* that there would be any delivery of the article nominally dealt in, but the same were carried through and settled by methods clearly devised to avoid the need of actual delivery.

The estimates of the witnesses vary as to the percentage of the transactions in which actual delivery was *contemplated* or had, running from one to fifteen per cent., thus proving that at least eighty-five and more probably ninety-five per cent. of the transactions would come under the condemnation of the Illinois statute."

The witnesses whose testimony is here referred to were members, or clerks of members, of petitioner, *selected* by respondents out of a total membership of eighteen hundred and out of several hundred members actively trading in these pits. Each witness necessarily confined his testimony to his own, or his firm's, business.

Not one of these witnesses testified that in a single trade—much less in his business as a whole—"it was not expected or understood that there would be any

delivery of the article nominally dealt in." Not one of them gave his estimate "as to the percentage of the transactions in which actual delivery was *contemplated.*" Each did give his estimate of the percentage of his firm's transactions, in which deliveries were *actually made* and this varied with the different witnesses from five to twenty-five per cent. From this, *and this alone,* the Circuit Court of Appeals found that "at least eighty-five and more probably ninety-five per cent. of the transactions" were "in all essentials gambling transactions." In other words, that court held that the mere fact that deliveries were not made at the *maturity* of these time-contracts is in itself sufficient to prove that deliveries were not *intended* when the contracts were *made.*

This view requires a consideration in detail of the nature and extent of the different kinds of business conducted on petitioner's exchange.

One class of traders, who participate largely in this future trading, are the *grain buyers.* The testimony of Mr. Marcy (Rec., 109-140), the manager of the Armour Grain Company, one of these grain buyers, stands uncontradicted in this record, and will sufficiently illustrate the business of this class. Mr. Marcy's company does a strictly merchandising business. It does not speculate at all (Rec., 113). It makes no contracts for future delivery except as a part of its grain business (Rec., 130) and except a very little commission business it does for others. The volume of its own grain business is 50,000,000 bushels a year or more. Every evening it sends from Chicago to numerous country points, offers to buy grain at a

certain price, if accepted by telegram by a certain hour the next morning. The next morning it aggregates the amount of these acceptances, and at once sells in the proper pits of petitioner's exchange *for future delivery* a like quantity of grain, such sales contemplating grain of a certain established grade. The aim of Armour Grain Company in doing this is to at once *find a place* for the grain it has bought, and thus eliminate all speculation and risk incident to the fluctuations of the market. Much of this grain, when thus bought, is not in a condition to go at once upon the market. In due time it is shipped to the Armour Grain Company at Chicago, is there inspected, put into elevators and warehouse receipts are issued therefor. If the grain is up to the grade specified in its time sales, the company frequently delivers it upon these sales. If it is not, it is necessarily sold as off-grade grain. Again, between the making of these sales for future delivery and their maturity, the Armour Company frequently finds it more profitable to divert the actual grain from Chicago to some other market, or, when it reaches Chicago, to sell it at once for export or consumption, than to hold and deliver it upon these future contracts. When sold as off-grade grain, or thus sold more profitably for export or consumption, the Armour Company, to meet its sales for future delivery, immediately upon selling the actual grain, makes, in petitioner's "pits" contracts to *purchase* the same quantity of the same kind of grain for delivery in the same month as in its previous sales. This practice is called in the trade "hedging."

Other witnesses engaged in this same kind of business, Pierce (Rec., p. 141), Weare (p. 164), Pettit (p. 182), and Martin (p. 209), testified that the amount of their hedging contracts equaled the amount of their purchases in the country, and that vast quantities of grain are actually delivered upon these hedging sales. *This evidence shows that practically all the grain brought to Chicago is thus hedged against upon petitioner's exchange.*

This record shows (see statistical book sent up as exhibit) that the receipts of wheat, corn and oats in Chicago for the year 1900 were 287,741,515 bushels. This does not represent, however, the total volume of these hedging contracts by these grain buyers. Much grain bought by them and hedged in these pits is subsequently diverted to other markets (Rec., 111, 210). Grain buyers at other points hedge on the Chicago market. Purchasers from these grain buyers, who hold and carry the grain in elevators until it goes into consumption, also hedge it in the same way (Rec., 114, 892).

The uncontradicted evidence of Mr. Marcy (Rec., 114) is that this ability to hedge is of great commercial value. It shows that before it was resorted to the grain buyer's profit in moving the grain from the farmer to a foreign market was from five to eight cents a bushel, which, by the elimination of the risk from price fluctuation by hedging, has been reduced to one and one-half to two cents a bushel, and that this hedging now forms a necessary part of the business of handling grain between the producer and the consumer.

The Circuit Court of Appeals holds illegal such of these hedging contracts by grain buyers *as are not completed by actual delivery.* This will be the more apparent from Judge Thompson's decision (115 Fed., 574), which the Circuit Court of Appeals approves, and which expressly declares these hedging transactions illegal.

The legality of this hedging can be determined by taking a single one of these transactions. The Armour Company buys 5,000 bushels of wheat, and at once proceeds to find an assured place for it by immediately selling in the "pits" an equal quantity for future delivery. Measured by the legal test usually applied to exchange transactions (*Clews* v. *Jamieson,* 182 U. S., 461), this sale is legal, unless *at the time it was made* the Armour Company did not intend delivery. Mr. Marcy clearly testified that his company did not make a future sale, until it has purchased a like amount in the country, and that the grain thus purchased is brought to Chicago and delivered upon this future contract unless, when it gets there, it does not come up to the required grade, or unless, intervening the making of the purchase in the country and the time specified in the sale for delivery, some one is willing to pay more for this grain than can be made by delivery upon the future sale. Now, when the Armour Company sells the wheat in the pit it does not know that the wheat purchased in the country will *not* grade so as to be deliverable. It is only after its inspection *in Chicago* that the Armour Company forms the intention not to deliver upon its future sale. So, too, the opportunity to sell more profitably for immediate delivery for export or consumption does not

ordinarily arise until after the grain reaches Chicago. Thus in neither contingency does the Armour Company intend not to deliver at the time it makes the hedging sale. Such intention is formed *after the sale,* and for a legitimate reason.

If this single transaction, as seems clear, does not contain the gambling intent and is valid, how can the business as a whole be illegal? If, as respects a single transaction, failure to complete the sale by actual delivery does not prove it illegal, how can the aggregate of such transactions be so regarded, merely because in a large portion of them delivery is not in fact made? Yet such is the decision of this Circuit Court of Appeals.

The evidence shows the future trading by the Armour Company in these pits to be exclusively of this class, and to aggregate in one year sales of 50,000,000 bushels, and that some of these transactions, involving 9,718,000, or about 20 per cent., were completed by actual delivery, and the balance was closed by counter purchases under circumstances already explained. Wherein does that part of these future sales of 50,000,000 bushels, which did not result in actual delivery, differ, as respects legality, from the sales of 9,718,000 bushels thereof, which were actually delivered? *The intention was the same at the time the transactions were made.*

Millers, when making large sales of flour to be delivered in the future, also hedge upon petitioner's exchange by buying for future delivery an equivalent quantity in wheat. Sometimes this wheat will be used to produce the flour, but more frequently the millers

buy upon personal inspection and in car lots the kind of wheat best suited for grinding, as it comes into the market, and then make counter sales to close their hedging purchases. So, too, millers, who accumulate in their mills wheat for future grinding, hedge by selling a like quantity for future delivery. Mr. Rice, a large Chicago miller, testified (Rec., 196) that otherwise millers would be obliged to exact a larger margin of profit to protect against the fluctuations of the market.

Of hedging by millers, the U. S. Industrial Commission (Final Report, Vol. 19, p. 186) says:

"This system, as stated by entirely trustworthy representatives of the trade, has been found absolutely necessary in order to prevent millers from assuming the extraordinary risk of changes in the market value of wheat. Only the more speculative and daring millers would undertake to fulfill future contracts without exercising this precaution of purchasing 'wheat futures.'"

Hedging is also extensively resorted to by exporters to foreign markets (Rec., 115, 143, 892) to protect against price-fluctuation during the voyage.

This hedging is also resorted to by packers (Rec., 374, 391, 786, 892), who, by the purchase of manufactured products for future delivery, protect themselves against fluctuation in the prices of the live stock, out of which these manufactured products are made.

In short, this hedging has become an essential facility in the present-day method of handling the products of the farm between the producer and the consumer.

It is impossible to attain even an approximate idea

of the volume of this hedging business upon petitioner's exchange. The brief of respondents' counsel in the lower court admitted that it "constitutes a very large part of the dealings in the pits" on such exchange. Indeed, it is a matter of common knowledge that this exchange is the principal hedging market of the world for grain dealers.

It is true that in much of the hedging by millers, and all of it done by exporters and packers, there is not, as in the hedging by grain buyers, an intention to deliver; but such hedging is in the nature of insurance against price-fluctuation. But this species of hedging is not, for this reason, any the less legal.

It is true that in ordinary transactions between a broker and his trader—which are practically the only cases in which courts have been called upon to decide the gambling issue—the test of legality is stated with sufficient accuracy by exacting an intent of both parties to deliver; for in such cases the mutual intent not to deliver sufficiently proves the gambling intent.

But not so in the case of the exporter or miller. When the former ships a cargo of wheat at San Francisco or New Orleans consigned to Liverpool, and contemporaneously sells on petitioner's exchange a like quantity of wheat for future delivery, he does not contemplate that this cargo will be available for delivery upon his future contract. Nor can he thus profit by a change in the price of wheat. What he makes upon his future sale, he loses upon his cargo, and *vice versa*. His hedging is incidental to his export transactions.

The gambler upon exchanges is one, whose only pur-

pose is to profit by the fluctuations of the market. The exporter, who thus hedges, resorts to the market, not to profit by taking a risk, but to avoid all risk. The gambling intent—and this is the real test—is with him wholly wanting. The two transactions are essentially different in intent and in legal contemplation. No court has yet declared this future trading by the exporter gambling, and no consideration of public policy requires it. Such hedging, as pointed out by the Circuit Court of Appeals (7th Cir.) in Case No. 280, is a species of "merchant's insurance" against price-fluctuation, which is no more to be condemned than is "insurance of property or life."

If these hedging contracts are legal, although not completed by actual delivery, then the decision that most of this time-trading (a very large part of which is hedging) consists of "gambling transactions" is without support in this record; for it is based solely upon the fact that in "at least eighty-five and more probably ninety-five per cent. of this trading, actual delivery is absent." The record does not show how much of the entire future trading is hedging; nor is it at all practicable to ascertain this.

In this hedging less than twenty per cent., in the case of the grain buyers, and in other kinds of hedging, a much less percentage, of this trading is completed by delivery. In order, therefore, to reach its conclusion, the Circuit Court of Appeals was obliged to treat, as it did, *all these hedging contracts as illegal.*

Hence it is unnecessary to discuss whether that court was right in its conclusions as to the percentage of deliveries to trading. While the wit-

nesses on this point were mostly members of petitioner, they were selected by respondents from firms doing a speculative business, wherein the proportion of deliveries would be much smaller than of firms doing a receiving, carrying, or shipping business. No accurate percentage of the whole could be arrived at without taking the evidence of a sufficient number of witnesses from *all* classes of traders to arrive at an average. This respondents have not attempted to do.

To continue further the consideration of the business of these grain buyers, and, as typical thereof, that of the Armour Grain Company, we have seen that eighty per cent. of its hedging sales are closed by counter purchases of the same quantity for the same month's delivery. If no method or opportunity for settling these offsetting trades were presented, the Armour Company would be compelled to await the delivery month before it could get rid of them. To obviate this and the risk and expense attending it, a system has been devised—which is recognized in petitioner's rules and is facilitated by its maintenance of a clearing house—to eliminate these practically closed trades by offsetting them. Most of this large record is taken up in showing this system of settlement.

This clearing house differs in no respect from the clearing house of banks. Its only office is to adjust money balances due between members by the payment of the least amount of money.

This system of elimination consists of what are called "direct" and "ring" settlements. The "direct" settlement is resorted to where the

Armour Company has sold to, and subsequently bought from, the *same* person a given quantity of grain, deliverable in the same month. Instead of waiting for delivery time to arrive and closing the contracts by delivery, the parties attain the same result by at once adjusting their contracts on the basis of the difference in the prices, at which the property has been sold and bought.

But in many cases the Armour Company has no grain sold to, and bought from, the *same* party, but this situation arises: It has sold for delivery in a certain month a certain quantity of grain to A and has subsequently contracted to buy from D a like quantity, deliverable in the same month. A, too, has sold a like quantiy to B, and B as sold a like quantity to C, and C has sold a like quantity to D, all deliverable in the same month. Thus the Armour Company, A, B, C and D have each bought *and* sold the same quantity of grain. Each of these parties, therefore, if no provision for prior settlement were made, would receive the grain on his or its purchase and deliver it out on his or its sale. The effect of this would be to wipe out all the contracts and *bring the grain back into the hands of the person from whom it started.* Now, in order to dispense with this useless formality and the capital, clerical force, etc., necessary to keep these offsetting trades open until delivery time, this offsetting or "ringing" system, has been adopted, and is recognized in petitioner's rules (Rule XXII, Secs. 6, 9), whereby as soon as feasible, these trades are eliminated from the books and business of the Armour Company by the adjustment of the difference

in prices. An arbitrary so-called "settlement price" is fixed each day, but this is only to more conveniently figure these differences, and does not in any way affect the result. (Rec., 578-581, 717, 774.)

It will thus be noted that neither a "direct" nor "ring" settlement takes place, unless each party to it has bought and sold the same property for delivery the same month and *consents* to the settlement. The purpose and effect of the system is, therefore, merely to avoid useless deliveries and eliminate trades that have fulfilled their purpose.

While the methods differ, the principle of this system of offsetting or elimination will be found in most commercial exchanges. Such a settlement system of the Chicago Stock Exchange was upheld in

Clews v. *Jamieson,* 182 U. S., 461.

The Chicago Stock Exchange system differs from the petitioner's only in that there the exchange itself, through its clearing house and officers, participates directly in the settling, whereas petitioner's members make their own settlements.

A similar system of the New Orleans Cotton Exchange was upheld in

Lehman v. *Feld,* 37 Fed., 852.

The Circuit Court of Appeals, in reaching its conclusion that these trades are gambling transactions, refers to this method of settlement as one of the "methods clearly devised to avoid the need of actual delivery."

But to pursue further the business of the Armour

Company—when it desires to deliver on its sales, or when it cannot offset its contracts of purchase and sale, and hence must close the same by delivery, the method of delivery is as follows:

The rules of petitioner require (Sec. 1, Rule XXI) that "all deliveries upon contracts for grain or flaxseed, unless otherwise expressly provided, shall be made by tender of regular warehouse receipts." In the absence of any further provision, the delivery could only be made by the seller sending the warehouse receipts, properly endorsed, to the office of the buyer, and there receiving payment in full for the grain, and, if such purchaser has resold, and desires to deliver, this grain to some one else, the same thing must be done. As warehouse receipts are usually endorsed in blank, a certain amount of risk attended the carrying around of the receipts themselves. (Rec., 697.) To obviate this and simplify the routine of the business petitioner has, by Sec. 2 of its Rule XXI, provided a delivery system whereby, after 11 o'clock a. m. (and on the first day of each month, before 11 o'clock also) and between 1:30 and 2:00 o'clock p. m., all deliveries are required to be made in a place designated by petitioner, and always by a notice in writing (See Rec., 685), stating in detail the warehouse receipts proposed to be delivered, the contract price, etc., signed by the issuer of such notice, which is delivered in lieu of the receipts themselves. If the person to whom this notice is first delivered desires to re-deliver the property, he does so by endorsing his name upon it, and handing it to the purchaser from him, and the rule provides that such notice, and all subsequent transfers thereof "shall

be deemed and held to be a valid and sufficient tender of property, on time contracts, * * * provided the property is actually delivered, or is shown to have been ready for delivery, in the manner and upon the terms" specified in the notice. The last recipient of the notice takes it to the issuer of it, pays for the grain on the basis of a certain delivery price arbitrarily fixed daily, and the difference between this arbitrary delivery price and the prices at which these different parties have sold or bought is collected through petitioner's clearing house. (Rec., 686-9.)

This method of delivery aids the expeditious, economical and safe transaction of business by these grain buyers, and we are at a loss to understand why counsel have made it the occasion for so much of the evidence in this record. A delivery of this kind, although symbolical, as is also delivery by warehouse receipts, is clearly a legal delivery.

Let us now consider the business of a purely speculative character. As said by the Circuit Court of Appeals in Case No. 280: "Speculation is not unlawful"; and by Judge Hammond in *Kirkpatrick* v. *Adams,* 20 Fed., 287, "Everybody has a right to speculate in prices if he does it through *bona fide* contracts for actual sale and delivery of the commodity."

There are, as every one knows, persons with capital who make a business of studying crop conditions the world over, and at times which to them seem opportune, speculate in grain by making time contracts on petitioner's exchange. If their desired profits are not realized before the time for delivery comes, they receive the grain and carry it until they think an oppor-

tune time for disposing of it has arrived, when they dispose of it either by making like time contracts on the exchange, or by exporting it or selling it to exporters, millers, etc. (Rec., 763-765.) But such time-trading is not illegal.

There are also doubtless many who avail themselves of the facilities of petitioner's exchange for making trades, which are, within the contemplation of the law, gambling transactions. But these persons are as a rule not members of the exchange. In much of the business upon petitioner's exchange (Rec., 189, 358, 827), its members, while principals as between themselves, are in reality agents for others.

Passing now to this kind of trading denominated as "speculative"—we shall best understand it by taking a single transaction. A non-member desires to speculate in grain, and to avail himself of the facilities of petitioner to do so. He gives an order to a broker, a member of petitioner, and the latter in the proper "pit" upon petitioner's exchange offers (as principal) to sell (or buy) the quantity of property in the customer's order. Another member, as principal, but acting also for a customer, by brief word of mouth, or nod or gesture, accepts the offer.

This transaction is two-fold in character, that between the non-member and his broker, and that between petitioner's two members. The former may be illegal, because the customer, with the knowledge of the broker, may desire only to speculate on the fluctuations of the market by the adjustment of differences; but this does not make the contract between the two

members unlawful. Before the law can pronounce it illegal, it must find that both parties to it (the members) intended that there should be no delivery. In most cases the broker receiving the order does not know the intention of his customer. Even if he does know it, he would not communicate it to the other member, with whom he contracts. What has taken place at the time of the making of the contract between the two members discloses no such intention.

On the contrary, petitioner's rules, subject to which all contracts are made (Rec., 440), require delivery, and this creates a presumption of legality. (*Bibb* v. *Allen*, 149 U. S., 499.) If the legality of this contract should be raised in a lawsuit between the two members, would any court, under these circumstances, declare it a gambling contract upon evidence that the customer of one of them did not intend delivery, and his broker knew it? Certainly not, because to adjudge such contract a gambling one, both parties to it (the two members) must, at the time it was made, have contemplated settlement without delivery.

To go a step further with this trade—the customer, knowing, as he must, that, if he waits until maturity of his contract the grain must be delivered (or received) by him, orders his broker to close the transaction, which the broker does by making, as principal, a counter-contract on petitioner's exchange. This would seldom be made, and then only by chance, with the same member, with whom he had made the original contract. As soon as this counter contract is made, the broker usually accounts to his customer at once for

the result to him of the transaction, because the members, by the custom of business, guarantee to their customers the performance of the contracts by the other members. (Rec., ...)

This, however, does not dispose of these contracts between the members. While the transaction as to the non-member is thus closed, his broker still has two open contracts with two different members for the same commodity, deliverable in the same month—one a contract of sale and the other a contract of purchase. If nothing intervenes before the time for delivery, this broker would then receive the grain upon his contract of purchase, and at once deliver it out upon his contract of sale. There being here an actual delivery such a transaction would be perfectly legal, although the intention of the customer was to gamble.

But this broker has—just as we have seen the Armour Company had—the same quantity bought and sold for the same month's delivery, and with the assent of other members similarly situated, he avoids a useless delivery by offsetting the trades by the same "ring" or "direct" settlement which the Armour Company and other grain buyers resort to.

At the time the broker makes for his customer these contracts, he cannot know that they will be adjusted in this way before delivery, or without delivery. He does know, however, that he must accept (or make) delivery, or forfeit his membership in petitioner, unless he is *subsequently* able to find other members with whom he has traded, who are willing to join in a "ring." If he cannot so settle, his only alternative is to accept delivery upon the purchase he made for his

customer, and then deliver out the property upon his customer's sale; and this, although the transaction as between himself and his customer, has long since been settled. Does such a settlement render illegal either of his contracts? Certainly not, because such contracts are valid in law, unless *when made* he and the other contracting member contemplated that there should be no delivery.

All the contracts for non-members are made subject to petitioner's rules, and by those rules a member may thus settle contracts of his principal and substitute others (Rule XXII, § 9), by becoming a guarantor to the principal against loss by reason of the substitution of contracts. In the operation of this ringing system it must always be that the broker has other contracts to substitute for those eliminated by the ring, unless he has been speculating on his own account, and Rule IV, Sec. 11, prohibits any member from assuming the attitude of both principal and agent toward his customer.

The foregoing statement of this single transaction explains all this speculative trading upon petitioner's exchange for non-members.

What has here been said shows that whatever is reprehensible in law exists in the transactions between the outsider and a member, and not in the transactions between the members upon the exchange.

These trades between members must, in the absence of clear proof of a mutual intention not to deliver, be presumed legal. *Bibb* v. *Allen*, 149 U. S., 499. The intention of a customer *not to* deliver may well co-exist

with the intention of his broker *to* deliver under his contract with his fellow member.

If the transactions upon the exchange are legal, this Illinois Statute would have no application here, although the transactions as between the brokers and their customers were illegal; for this statute only inhibits the keeping of a place *where* gambling transactions are made.

The Circuit Court of Appeals therefore erred in holding that the bulk of the time-trading on petitioner's exchange was "in all essentials gambling transactions."

III.

SHOULD PETITIONER BE HELD RESPONSIBLE FOR WHATEVER GAMBLING THERE IS UPON ITS EXCHANGE, AND ON THIS ACCOUNT BE DEPRIVED OF A RIGHT TO SUE TO PROTECT ITS PROPERTY IN ITS QUOTATIONS?

This, as already indicated, is the ultimate question of fact presented by the evidence as to the character of these transactions. Here it is necessary to consider somewhat the purpose and utility of the commercial exchange.

The experience of the world has shown that commercial exchanges are an essential part of every highly developed commerce. No great financial or commercial center is without one. Amsterdam as early as 1670 had its bourse, which has since become a large exchange for stocks and grain. The Bourse of Frankfort dates back beyond the last century. The Vienna

Bourse was founded in 1771. The Paris Bourse traces its origin to an edict of 1549, and now occupies a building commenced in 1808. The present Berlin Bourse dates back before the reign of Frederick the Great. The London Stock Exchange became a regular organization as early as 1762. The New York Stock Exchange was first organized as the "New York Stock and Exchange Board" in 1817. Boston, Philadelphia, Baltimore, New Orleans, St. Louis, Kansas City, Minneapolis, Milwaukee, etc., have their exchanges, each contributing materially to the commerce of its city.

The chief, if not the only real, *function* of a commercial exchange is to provide improved facilities for trade. These include an exchange hall, where its members may, between certain "market" hours, meet daily to trade, the gathering and display there of all available commercial or trade news that will enable its members to better estimate the conditions affecting future values, and thus trade more intelligently; by-laws and trade usages, which become part of, and thus simplify, the contracts of members; by-laws prescribing the manner of performing and settling contracts and providing for the deposit of securities on open contracts; by-laws providing for the speedy settlement of trade disputes by arbitration before tribunals of the exchange; by-laws exacting from members, as a condition of continued membership, a high degree of business integrity, and providing for purging the membership of those guilty of uncommercial or dishonest conduct; in short, all other available facilities, which render it easy, cheap and safe to trade.

Upon the question of the *utility* of exchanges, all

do not agree. There is, of course, a class of unthinking radicals, quite numerous in the west, who see in them only evil. Their hostility is not only to commercial exchanges, but to banks, a stable currency, corporations and many other facilities of commerce, through which some grow richer than others.

No thoughtful person, however, considers the commercial exchange as either entirely free from evil or wholly devoid of good. Its opponents concede that it aids legitimate commerce; its friends admit that it facilitates illegal and harmful speculation. The former think that the evil preponderates over the good, and that gambling is the essense, and help to commerce the incident. Its advocates, on the contrary, think that the aid it renders to commerce outweighs the evil of the speculation it gives rise to. They thus differ only as to their conception of the ratio of benefit to injury.

There is one evil, miscalled speculation, but in reality gambling, for which the exchanges are responsible, and which, with the aid of the law, they can stop without impairing their own efficiency. This is the business of bucketshops. Without the market quotations of the exchanges there would be no bucketshops. Deprive them of the quotations, and you destroy them. Realizing this, petitioner is doing what it can to keep its quotations from bucket shops. If the other leading exchanges adopt the same course, the bucketshop will go.

Other forms of illicit speculation it is more difficult to prevent. The speculative spirit is not created by exchanges. It is innate. So long as the desire for gain finds a place in the human breast, there will be, in

some form, speculation. This speculation will be always attracted to commodities that are susceptible of ready transfer. Grain is such because, when put into warehouses and divided into grades, it assumes the form of a document transferable from hand to hand. The same is true of corporate stocks. The commercial exchanges, by furnishing, in aid of legitimate commerce, improved facilities for trade in these kinds of properties, do doubtless promote improper speculation. When they create a market and its facilities, the speculators step in and avail themselves of them. The greater the efficiency with which an exchange facilitates legitimate commerce, the more it contributes to this speculation. To this extent, and to this extent only, do exchanges contribute to improper speculation, petitioner no more than the New York Stock Exchange, New Orleans Cotton Exchange, and others.

But the evil is here incapable of separation from the good. This kind of speculation cannot be stopped on exchanges without impairing their efficiency to discharge their legitimate functions. Hence they, who think the evil preponderates over the good in the exchange, would suppress the exchange, or at least all time-trading there, in order to stop speculation.

But whether it is wise to do this is essentially a political, and not a judicial, question. It concerns the public policy of a state, which it is the exclusive province of its legislature to declare. As Illinois has granted petitioner a special charter, and has not passed any statute, *which its courts have construed as prohibiting time-trading upon its exchange,* the

consideration of this case should start with the proposition, that, in maintaining its exchange and time-trading thereon, petitioner does not violate public policy.

But assuming that the Illinois statute does include commercial exchanges, it is a criminal statute, and as such, is to be strictly construed. Hence petitioner cannot be held to violate it, unless guilty of some *intentional* wrongdoing.

As the alleged "pretended" buying and selling is not "conducted" by petitioner, the only provision of this statute, which it can be said to violate, is that which prohibits the keeping of a place wherein such buying and selling is "permitted." The word "permitted" implies the doing of something that the party could reasonably prevent. Hence petitioner's misconduct, if any, must consist in its failure to make reasonable efforts to prevent trading in which delivery is not contemplated.

Thus, whether the Illinois bucketshop statute, or the general law be here the test, the question is, in what does the misconduct of petitioner consist? It transacts no business. It only maintains an exchange hall, admits and expels members, and provides rules to govern them in their relations to it, and in their transactions with each other upon its exchange. These rules, among other things, provide as follows (Rule IV):

Sec. 8. "Any member of the Association who shall be interested or associated in business with, or who shall act as the representative of, or who shall knowingly execute any order or orders for the account of any organization, firm or individual engaged in the business of dealing in differences on the fluctuations

in the market price of any commodity—without a bona fide purchase and sale of property for an actual delivery—shall be deemed guilty of unmercantile conduct, which renders him unworthy to be a member of the Association; and upon complaint to and conviction thereof by the Board of Directors, shall be expelled from membership in the Association."

Sec. 9. "When any member shall be guilty of making or reporting any false or fictitious purchase or sale, * * * or when a member shall, either in the Exchange Building or elsewhere, contract to give to himself or another the option to sell or buy any of the articles dealt in on this Exchange in violation of any criminal statute of this state, he shall be expelled by the Board of Directors."

Petitioner also exacts from each of its incoming members an agreement to abide by its rules. (Rule X.)

The above rules are practically the same as in *Clews* v. *Jamieson* (182 U. S., 461), of which this court said:

"Of course, we do not say that these rules actually prevent gambling on the exchange. It is possible, if not probable, that gambling may be and is in fact carried on there, but it must be in violation of, and not pursuant to, the rules."

What more could petitioner do to prevent it?

The purely speculative transactions are not distinguishable in form or outward appearances from the others. If petitioner were to constantly surround its pits with official watchers, they could not distinguish the one kind of contract from the other. What distinguishes the transactions is the *intention* of the parties. But how can petitioner ascertain what is in the minds of the traders or their customers? As well said by Judge Hook in this case (Rec., 959):

"Common experience justifies the observation that in the great majority of cases it is impossible to secure

the requisite evidence of the gaming character of such transactions. And it is not competent to any finite being to search the minds of the participants and discover their purposes and intentions."

The quotations are likewise incapable of separation, as is self-evident from the manner in which they are collected (Rec., 235, 834, 839).

True, petitioner provides facilities for expeditiously conducting business (including time-trading), such as an exchange hall, a clearing house, a system of offsetting contracts, etc., which are a great aid to legitimate commerce. Must it deprive all its 1,800 members of these facilities, because they are susceptible of misuse, or are misused by some members or their customers? A negative answer is given to this by *Clews* v. *Jamieson* (182 U. S., 461).

Indeed, the decision of the Circuit Court of Appeals in the case at bar seems to be in direct conflict with *Clews* v. *Jamieson*. In that case the transactions under consideration arose in Illinois. This same criminal statute was there under review by this court. The lower court adjudged the transactions gambling because entered into with reference to a certain facility for ready settlement, provided by the rules of the Chicago Stock Exchange and known as trading "for the account." But this court adjudged this facility, although liable to misuse, legal and upheld the transactions made with reference to it. If we understand that decision, it upholds the action of the exchanges in providing efficient facilities for trade, *although these facilities are such as speculators may, and do, avail themselves of.* If so, is it not clear that the Circuit Court of Appeals

has in effect ignored *Clews* v. *Jamieson;* for it decided, in applying the laws of the same state, that petitioner cannot sue in the Federal courts, because its exchange—which is but the sum total of its facilities for trade—attracts much illegal speculation?

Further, is it not apparent, when the actual situation upon petitioner's exchange is understood—and to make it so has been the object of the preceding detailed statement of the methods of business there—that nothing short of a *prohibition* of all contracts for future delivery would prevent speculation, if, indeed, this would? Hence the legislature, if it intended this bucketshop statute to apply to this exchange, must have contemplated the prohibition of all time-trading thereon.

But the state of Illinois has never evinced an intention to prohibit all contracts for future delivery in order to stop illegal speculation, and in view of the recent experience of Germany in this direction, is not liable to do so. It doubtless appreciates that all speculation can no more be suppressed than can all drinking, and that, whatever may be its moral aspects, speculation upon these exchanges has a distinct commercial value. It is there made a servant of commerce. This time-trading, as already explained, is an essential part of the distributive system by which the crops are marketed. That these grain buyers may *sell* for future delivery to hedge, there must be others there—the speculators—who are willing to *buy* for future delivery. The presence of these latter creates a market—and the more of them there are the broader is this market—which, meeting and ab-

sorbing these hedging sales, carries the grain (to the profit of producers and consumers), from the time the farmers sell it in the fall, until it is absorbed during the year by the consumers.

In case No. 280, where the evidence as to the character of these quotations was substantially the same as in the case at bar, the Circuit Court of Appeals of the Seventh Circuit (130 Fed., 513) said:

"Appellant was chartered by Illinois for a lawful and useful purpose, and the association adopted and promulgated suitable by-laws and rules. We think the record fails to show that the dominant feature of the members' dealings was unlawful, much less that appellant, as a creature of the state, was violating its charter, or was *particeps criminis* in what gambling the members carried on."

Hence, even if much of this time-trading upon its exchange be gambling, petitioner is in no position, and hence under no duty, to prevent it, and its failure to do so does not constitute a violation of the Illinois statute nor such misconduct as should close against it the doors of the Federal courts.

IV.

THERE IS A PROPERTY RIGHT IN THESE QUOTATIONS WHICH EQUITY WILL PROTECT BY INJUNCTION.

These quotations originate in an exchange hall, which is private property of petitioner. All persons may be excluded from it. Petitioner's members and such employes and telegraph operators as are necessary to the transaction of business there are, as a rule, the only persons admitted to the floor of the exchange.

There is a gallery which petitioner permits visitors to enter.

On the floor of this exchange hall a place is set apart for each of the four commodities (wheat, corn, oats and provisions) most extensively traded in. These places are called "pits." The market hours (except on Saturdays) are from 9:30 a. m. to 1:15 p. m. In each of these pits the trading is by *viva voce* bidding. At each pit during the market hours is stationed a person trained to follow the course of prices in the bidding, who writes upon a piece of paper the opening price of each commodity and each change of price during the day, and immediately gives each slip of paper to a messenger, who at once delivers it to a telegraph operated in the exchange hall, who in turn transmits it over a telegraph wire to the offices in Chicago of the telegraph companies authorized by petitioner to distribute these quotations.

In two of these telegraph offices the quotations are automatically transferred to other wires running from Chicago to different parts of the country, and thus each quotation is automatically transmitted from petitioner's exchange hall directly to all parts of the country within fifteen or twenty seconds after the transaction, whose price it records. In some of the larger cities these telegraph companies re-transmit them in such way that they are automatically printed on tape in their customers' offices by means of an instrument known as a "ticker." (Rec., 235-238.)

The expense to petitioner of thus collecting these quotations on its exchange floor is about $7,000 a year. (Rec., 237, 238.)

Respondents contend that the parties to each individual transaction are entitled to, and do, know the price in that transaction, and that, therefore, the ownership of the information is in the brokers who make the transactions and their principals, and not the petitioner. But it is the knowledge of the market as an *entirety* that is the real thing of value. It is the segregation of single items collected from the different pits, immediately arranged consecutively, and put in form to be transmitted instantaneously, that constitutes this news. Neither an individual broker, nor principal, nor the brokers, nor principals in the transactions collectively, have any right to do this. Petitioner alone may.

Thus this market news is at the outset within the exclusive dominion and control of petitioner. When assembled and reduced to a form susceptible of use, it is a product of effort and expenditure by petitioner.

By the contracts between petitioner and the distributing telegraph companies, the latter agree to give these continuous quotations only to such persons (other than bucket shops) as shall respectively sign an agreement with the telegraph company and *petitioner* that such quotations shall be only for the applicant's individual use, and be confined to his business and office.

It is admitted (Rec., 84) that all persons, who get the quotations from these telegraph companies, have thus agreed to such restricted use of the quotations. (See Rec., 248, 300, 324.) The persons who thus receive them sometimes display them upon blackboards in their offices for the benefit of their customers. No other or different use of the quotations is shown. They are in no sense made public.

Thus, by means of modern electrical appliances a continuous story is told of the course of this market, from 9:30 a. m. to 1:15 p. m., to a *limited* number of persons, viz., such as do not conduct bucketshops, and sign these contracts.

In principle this method of communicating this market news is nowise different from what it would be, if the operator on the exchange floor told this story of the market through a *telephone* to this limited number of persons. Indeed, if sufficient exaggeration of sound in telephoning shall hereafter be attained to enable all persons in a room to hear the talk over the telephone, transmission by telephone may supplant the present method.

Again, thus telephoning this information cannot, in principle, be distinguished from collecting the same persons in a single hall, and there communicating to them this story of this market.

In short, this method of communicating this market news by telegraphy to this limited number of persons is not different in principle from the delivery of a lecture or the production of a play in a hall or theater before persons there assembled to listen.

Thus, there is but a restricted or limited distribution of these quotations.

The courts both in England and this country hold, *without any conflict whatever*, that market news thus distributed, is a species of property, which a court of equity will protect by injunction.

Exchange Tel. Co. v. *Gregory*, L. R. (1896), 1 Q. B., 147.

F. W. Dodge Co. v. *Construction Co.*, 183 Mass., 62.

Kiernan v. *Manhattan Tel. Co.*, 50 How. Pr., 194.

National Tel. News. Co. v. *Western Union Tel. Co.*, 56 C. C. A., 198; 119 Fed. Rep., 294.

Illinois Com. Co. v. *Cleveland Tel. Co.*, 56 C. C. A., 205; 119 Fed., 301.

Cleveland Telegraph Co. v. *Stone*, 105 Fed., 594.

Board of Trade v. *Hadden-Krull Co.*, 103 Fed., 902; s. c., 109 Fed., 705.

Opinion of Judge Hook in the case at bar, 116 Fed., 944.

That petitioner's quotations are a "species of property" is also decided in

Stock Exchange v. *Board of Trade*, 127 Ill., 153.

That this market news is too evanescent to derive any protection from the Copyright Act, a perusal of that statute will show. That it was not intended to protect news of this character is conceded by counsel and has been decided. (*National Telegraph News Co.* v. *Western Union Tel. Co., supra; Clayton* v. *Stone*, 2 Payne, 382; Fed. Cas., 2872.)

The foregoing cases extend judicial protection to news on two different theories. One theory is that this industry of news-gathering, which is the outgrowth of new trade-conditions, has presented a new subject-matter—more in the nature of a service than prop-

erty—which demands, and should receive, judicial protection against piracy. This phase is enunciated in

National Telegraph News Co. v. *Western Union Telegraph Co., supra.*

In that case the Western Union Telegraph Company was collecting at various points news relating to events there transpiring, and after accumulating it in its office by means of its wires, redistributed it through its tickers in hotels and other places of its patrons *without imposing any restrictions as to use.* A rival telegraph company, having a similar equipment, claimed the right to appropriate this news from these tickers and redistribute it over its own tickers to its patrons on the ground that the display of this news on the tickers made it common to all. The Circuit Court of Appeals of the 7th Circuit, however, affirmed a decision restraining the defendants from appropriating the news, saying:

"Is service like this to be outlawed? Is the enterprise of the great news agencies, or the independent enterprise of the great newspapers, or of the great telegraph and cable lines, to be denied appeal to the courts, against the inroads of the parasite, for no other reason than that the law, fashioned hitherto to fit the relations of authors and the public, cannot be made to fit the relations of the public and this dissimilar class of servants? Are we to fail our plain duty for mere lack of precedent? We choose, rather, to make precedent—one from which is eliminated, as immaterial, the law grown up around authorship—and we see no better way to start this precedent upon a career than by affirming the order appealed from."

This decision would seem to commend itself to the common sense of mankind. Why should the law be held incapable of adjustment to new conditions? Why

should not this news-gathering be protected by law? It would encourage enterprise in the quick dissemination of knowledge that is beneficial to commerce. Why should courts not here afford protection against pirates? Especially should they do so in the case of market quotations, as this is essential to prevent them from being misused in bucketshops.

The case at bar is, indeed, stronger than that of ordinary news agencies. These, by an expenditure of effort and expense, gather, and thereby make their own, news that originally is common to the public; while petitioner by effort and expense gathers in a building within its exclusive control, news and information which has not become common.

The other theory is derived from the analogy deducible from the law of literary property, and the principle of limited publication therein.

In the foregoing cases based on this theory, there was either an express or implied restriction upon the distribution of the news.

In *Exchange Telegraph Co. v. Gregory, supra*, the telegraph company received from the London Stock Exchange its quotations under a contract requiring the telegraph company to exact from each of its customers an agreement that the quotations "should not be sold or communicated to non-subscribers." The defendant having obtained these quotations from one of these subscribers, the telegraph company was granted an injunction. The English Court of Appeal held the quotations were property, Rigby, L. J., also saying (italics ours):

"I do not see how it can be said that because this

information *was intended to be supplied to a large section of the public* the plaintiffs are deprived of their right to protection in respect of it. They were entitled to limit the supply of that information in such lawful manner as they thought fit; and it is plain that they did contract with the persons to whom they supplied it that those persons should not, either by sending telegrams or furnishing copies, supply it to others."

In *Kiernan* v. *Manhattan Tel. Co., supra,* the Associated Press gathered abroad financial news, there accessible to everybody, cabled it to New York, and there sold it to plaintiff, who by telegraph transmitted it immediately to his customers without express restrictions as to its use by them. The court recognized the right of property in such news and protected it by injunction, saying:

"It would be an atrocious doctrine to hold that dispatches, the result of the diligence and expenditure of one man, could with impunity be pilfered and published by another. * * * Applying this principle to the case of the Associated Press, it is clear that it has a right of property in all news transmitted to it by its agents, until it abandons that right by publication. * * * Does the plaintiff abandon such right by transmitting such news to his customers? * * *

I am unable to see that it makes any difference in the principle governing written communications whether Mr. Kiernan, sitting in his office, by means of the telegraph writes his communications upon paper in the office of his customer; or whether he writes the communication in his own office and then sends it to his customers."

And after holding that, although there was no express, there was an implied, restriction of the use of the news to the offices of Mr. Kiernan's customers, the court held that the "transmission by Mr. Kiernan of his

foreign financial news to his customers was but a qualified publication, which did not forfeit his right of property therein."

In *F. W. Dodge Co.* v. *Construction Co., supra,* the Supreme Court of Massachusetts applied this principle to a case, wherein certain trade news was disseminated under the same restrictions as in the case at bar.

All the other cases above cited are suits (like the one at bar) brought by petitioner, and the courts recognized and protected its property right in its quotations. In one, *Board of Trade* v. *Hadden-Krull Co.,* Judge Seaman said:

"These market quotations are peculiar in their property use and value, and, without immediate transmission to the customer, so that he receives them simultaneously with all other customers, and before their publication generally, they possess no purchase value. To make them available, it is essential to have the quotations written or printed in some form for the information of all entitled to their use; and it appears here that they were in some instances so furnished in the 'ticker', and in others were placed on a blackboard in the office of the customer. No reason appears for finding a publication in the one method if not in the other, and I am of opinion that neither constituted a dedication to the public while limited to the use and office of the customer."

In resisting this resort to the analogy of the law of literary property, respondents' counsel raise the much-mooted question, whether the right to multiply copies after a first publication was *created* by the copyright act, or existed at common law.

The great case of *Millar* v. *Taylor,* 4 Burr., 2303, as modified by the House of Lords in *Donaldsons* v.

Becket, 4 Burr., 2408, established in England the following principles:

1. At common law an author has a right of property in, and the sole right to print and publish, his compositions.

2. This right of property is not, at common law, lost by printing and publishing; but the author has the exclusive right to multiply copies after publication.

3. This common law right was superseded by the copyright act of Anne, and since that statute the only right *after* publication rests upon a compliance with that statute.

The House of Lords modified *Millar* v. *Taylor*, but not, as counsel contend, because of the absence of a property right in literary productions at common law after publication, but because a majority of the judges were of opinion that the copyright act had abridged the common law right.

In *Wheaton* v. *Peters*, 8 Peters, 591, this court in considering the same questions, sustained the first and third propositions above, and what is said upon the second was therefore in a measure *obiter*, as is manifest from the later case of

Holmes v. *Hurst*, 174 U. S., 82,

where this court, after referring to the above cases, said (italics ours):

"While the propriety of these decisions has been the subject of a good deal of controversy among legal writers, it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and

determined by the copyright act—in other words, that *while a right did exist by common law*, it has been superseded by statute."

Nor does—as counsel claim—*Jefferys* v. *Boosey*, 4 H. L. C., 815 (1854), hold that at common law there was no property right after publication.

There an alien composed an opera, and assigned his right therein to another alien, who, in turn, assigned it to a native-born subject and resident of England, who took the necessary steps to comply with the English copyright law, and brought an action of *case* against an alleged English pirate. The House of Lords, overruling the Exchequer Chamber, held that the trial court did not err in directing a verdict for defendant.

As the Statute of Anne had superseded the common law, and the right of plaintiff, if any, was the creature of that statute, the sole question in that case was, whether that statute extended protection to a foreign author, not domiciled in England, or his assignee (domiciled in England), and the House of Lords decided this in the negative.

Eleven judges were summoned by the House of Lords, ten of whom gave opinions, as did the Lord Chancellor and two Lords. Of these, Justices Crompton (p. 846), Williams, Wrightman and Maule (p. 893), Baron Alderson, Lord Chief Justice Jervis, Lord Brougham and Lord St. Leonards (p. 978), either ignored the question of the right at common law, or expressly advised the Lords that a discussion of it was not necessary to a decision of the case at bar. Justices Earle (p. 873) and Cole-

ridge (p. 902) declared themselves in favor of such common law right.

Drone on Copyright, p. 116, says:

"At common law the ownership of literary property is not lost by any publication of the work. * * * When these rights are lost by publication, it is not by force of the common law, but by operation of the statute, as it has been judicially construed. This principle is put beyond doubt by the judgment pronounced by the House of Lords in 1774, in *Donaldson* v. *Becket*."

But the solution of this question is not essential to the decision of this case, because they, who deny a common law right after publication, necessarily concede that it is not lost by a *limited* or restricted publication. (Mr. Justice Yates in *Millar* v. *Taylor*, 4 Burr., 2355, 66.) This is necessarily so, because otherwise the first production of a play or the first delivery of a lecture would terminate the exclusive right in it.

The statute of Anne protected the author of a play only in his exclusive right to *publish* in prints, but not in that of public representation. That was not modified until the St. 3 & 4, Will. IV, c. 15, and subsequently by that of 5th & 6th of Vict., C. 45. In this country it was not until August, 1856, that the playwright's exclusive right to *produce* a drama, or authorize others to do so, was recognized by *statute*.

Nor does the present statute protect a lecturer's property in a lecture, or that of a writer in a drama, that is not printed and copyrighted.

Yet the courts *under the principles of the common law* still protect this property right of the lecturer and the playwright upon the theory that the delivery of a lecture, or the production of a play, in a hall or

theatre, before a limited number of persons, is but a *limited* publication, and not such a one as destroys the common law right, or requires a resort to the copyright laws. In

Tompkins v. *Halleck*, 133 Mass., 32,

a drama never copyrighted nor printed, was produced at a theater, and one Byron, with the intention of reproducing it, attended frequently and after each performance dictated as much as he could remember to a stenographer until the copy was completed, and when he was about to cause its production, a court of equity was successfully appealed to by a purchaser from the playwright for an injunction. The court, after overruling *Keene* v. *Kimball*, 16 Gray, 545, said:

"But the representation of an unprinted work upon the stage is not a publication which will deprive the author or his assignee of his rights of property therein. * * * Nor will it deprive him of his power to prevent a publication in print thereof by another. * * * Nor can we perceive why it should deprive him of his right to restrain the public representation thereof by another. * * * The implied contract of the author of a play, which is not printed or copyrighted, with the spectator, is closely analogous to that of the lecturer with his pupil. * * * The special use of his play made by the author, for his own advantage, by a representation thereof for money, is not an abandonment of his property nor a complete dedication of it to the public, but is entirely consistent with an exclusive right to control such representation."

Palmer v. *DeWitt*, 47 N. Y., 532.

There an injunction issued to protect the property in an unprinted play against one proposing to print it. On the question of publication, the court said:

"So far as is disclosed by the case the drama remained in manuscript until printed by the defendant,

and there is no claim that it has been published by the author or plaintiff, or with their assent, except by public performance on the stage; and if it has not by that act become *publici juris* it still remains the private property of the author or his assignee, who alone have the exclusive right to it, and may prevent its publication. When a literary work is exhibited for a particular purpose, or to a limited number of persons, it will not be construed as a general gift or authority for any purpose of profit or publication by others. An author retains his right in his manuscript until he relinquishes it by contract, or some unequivocal act indicating an *intent* to dedicate it to the public. An unqualified publication by printing and offering for sale is such a dedication. * * * Lectures and plays are not, by their public delivery or performance, in the presence of all who choose to attend, so dedicated to the public that they can be printed and published without the author's permission. * * * The permission to act a play at a public theatre does not amount to an abandonment by the author of his title to it, or to a dedication of it to the public."

Other cases applying the same principle to dramas, the exhibition of paintings, etc., are:

Macklin v. *Richardson*, Ambl., 694;

Crowe v. *Aiken*, 2 Biss., 208; Fed. Cas. No. 3441.

Albert v. *Strange*, 2 DeG. S. & M., 652.

Turner v. *Robinson*, 10 Irish Ch., 121.

The same rule applies in the case of lectures.

Abernathy v. *Hutchinson*, 1 Hall & Tw., 28.

There the London Lancet was publishing, without the sanction of the lecturer, medical lectures which were being delivered to a class of students. Lord Chancellor Eldon sustained the right of injunction, and said that he was "clearly of opinion

that when persons were admitted as pupils or otherwise to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of shorthand, yet they could do that only for the purposes of their own information, and could not publish for profit that which they had not obtained the right of selling;" and that "the injunction ought to go upon the ground of property."

Caird v. *Sime*, L. R. (1887), 12 H. of L., 326.

In that case the House of Lords decided that the delivering of lectures by a professor of a publicly endowed university to students there did not constitute a dedication thereof to the public.

Lord Watson said:

"The only question which we have to decide is whether the oral delivery of the appellant's lectures to the students attending his class is, in law, equivalent to communication to the public.

The author's right of property in his unpublished work being undoubted, it has also been settled that he may communicate it to others under such limitations as will not interfere with the continuance of the right. * * * The principle which pervades the whole of that reasoning is, that where the persons present at a lecture are not the general public, but a limited class of the public, selected and admitted for the sole and special purpose of receiving individual instruction, they may make any use they can of the lectures, to the extent of taking it down in shorthand for their own information and improvement; but cannot publish it. If that be the real character of the relation between the lecturer and those whom he addressed, it is immaterial whether they are selected by himself or others, so long as it is a matter

of express stipulation, or of reasonable implication, that the duty which he undertakes is limited to giving personal instruction to the individuals composing his audience."

In *Bartlette* v. *Crittendon*, 4 McLean, 300 (Fed. Cases, No. 1082), plaintiff had invented a new system of bookkeeping, and was maintaining a school in which to teach it. A publishing firm got possession of one of the copies of the manuscript describing the system, but was enjoined from publishing it, the court saying:

"Copies of the manuscript were taken for the benefit of his pupils and to enable them to teach others. This, from the facts and circumstances of the case, seems to have been the extent of the complainant's consent. * * * The inquiry is, does such a publication constitute an abandonment? * * * The students of Bartlette, who made these copies, have a right to them and to their use as originally intended. But they have no right to a use which was not in the contemplation of the complainant and of themselves when the consent was first given. Nor can they by suffering others to copy the manuscript give a greater license than was vested in themselves."

Hence petitioner has a property right in the quotations despite the restricted distribution thereof above stated.

It is admitted (Rec., 194) that the respondents were, when this bill was filed, posting petitioner's continuous quotations, and it is shown (Rec., 526, 566, 312, 324), that they were not acquiring them from any of the telegraph companies authorized by petitioner to distribute them. Hence they were purloining these quotations, or acquiring them from others who did so. To prevent this an injunction is the only adequate remedy, and the Circuit Court properly granted one.

V.

THE CONTRACT BETWEEN PETITIONER AND THE TELEGRAPH COMPANIES IS NOT ILLEGAL.

If the contract be illegal, and petitioner were suing to *enforce* it, or were interposing it as a defense to a suit by respondents to obtain from petitioner the quotations, the question of its illegality would arise.

But such is not the case. Respondents have not applied for the quotations. How can they defeat a suit to enjoin them from purloining petitioner's property by alleging that it has made an illegal contract respecting its sale? But as other pending suits do involve the legality of this contract, we proceed to consider it.

Counsel contend that the contract is illegal because its restriction upon the distribution of these quotations violates (1) the general law; (2) Sherman Anti-trust Act; and (3) the Missouri anti-trust statute.

The restriction upon the distribution of the quotations is only partial. The contract recognizes two kinds of quotations, continuous and periodic quotations. (Rec., 17.) The latter consist of those, wherein the price of any commodity is quoted at intervals of ten minutes or more. The requirements of farmers, country grain dealers; millers, etc., are adequately met by knowing the price of grain on petitioner's exchange every ten minutes or more. Thus a large demand has grown up in the West for this kind of quotation service, which the telegraph companies are by the contract authorized to,

and do, render without restriction or discrimination. The respondent company is receiving these periodic quotations from one of these telegraph companies (Rec., 194), and the decree of the Circuit Court does not interfere with this. Respondents also purloin the *continuous* quotations.

The *only* restriction in the contract is upon the distribution of *continuous* quotations. These constitute every successive change during market hours in the prices of the commodities most actively dealt in on petitioner's exchange. The almost instantaneous distribution of these brings the recipients of them, as it were, into constant presence with the market itself. This class of quotations are as a rule sought only by other exchanges, brokers, and bucket shops. In the latter they are, as already shown, essential to the so-called trading there.

Again, the *only* restriction imposed upon the distribution of these continuous quotations is, that they shall not be given to bucket shops. The telegraph companies agree (Rec., 11) that they "will not knowingly furnish or sell, directly or indirectly, said continuous quotations to any person, firm or corporation conducting a bucket shop;" and the contract also provides that "the procedure to be adopted for the purpose of determining whether any applicant for such continuous quotations * * * contemplates using them * * * for any of the prohibited purposes aforesaid" shall be the exaction from such applicant of a written application (Rec., 11, 12) in which he agrees that he is not keeping, and will not conduct, a bucket shop, nor use such quotations therein. Upon the re-

ceipt of this an investigation into the business of the applicant by the petitioner is provided for.

The contract further provides (Rec., 17):

"The only intent and purpose hereof, being to prevent the misuse of said quotations for said unlawful purposes, or in said unlawful business, and not to discriminate between persons desiring them for other than said prohibited purposes."

From these several provisions considered together, as they should be, it is apparent that the contract contemplates no discrimination except against bucket shops.

Counsel, however, contend that the specific language used in the application (Rec., 12) extends the restriction to others than keepers of bucket shops. Here, however, they overlook the fact that this language has a recognized legal meaning. It is the Congressional definition of a bucket shop, and is taken, word for word, from the Act of Congress imposing a tax on bucket shops. (II Supp. U. S. Rev. Stat., 1519.) That this language was by Congress deemed an accurate definition of a bucket shop is apparent from the statements of Senator Aldrich and Chairman Payne in reporting the bill to their respective Houses. (Cong. Rec., Vol. 34, No. 47, p. 2205, 3595.)

This language applies only to keepers of places wherein is conducted the *business* of making or offering to make contracts wherein the parties contemplate or intend that the contract may be closed upon, or with reference to, the quotations of an exchange *and* without a *bona fide* transaction on such exchange, or contemplate that the transaction may be deemed closed when the market quotations of an exchange *reach a certain figure*. In thus referring to the *making* of con-

tracts in which the parties contemplate or intend, etc., such intent in the *making*—that is, at the time of the making of such contracts—is clearly meant. The legal test of a gambling transaction is, whether delivery is intended when the contract is made. How can it be said that a delivery is contemplated when the parties, at the time they make the contract, contemplate that the trade *may be* closed, not by delivery, but on the basis of the quotations of an exchange, or contemplate that it may be deemed closed without delivery, and when the quotations of an exchange *reach a certain figure.*

This is the distinguishing feature of a bucket shop. In a legitimate transaction of purchase and sale the actual delivery of the property is intended, not the closing of the contract upon quotations. All contracts for future delivery upon petitioner's exchange (and other exchanges) when not completed by delivery, are closed by making counter-trades in the open market at the best price the broker can obtain there.

On the other hand, in every bucket shop the parties agree upon a certain margin (usually paid by the customer in advance) which limits his loss. The price to which this sum carries the bet is figured, and when the blackboard quotation reaches this price, the trade is wiped out or "closes itself."

This court will see with what accuracy Congress has defined a bucket shop by reading the description of its methods contained in the opinion in

Christie Co. v. *Board of Trade,* 94 Ill. App., 229,

where the court adjudged to be a bucket shop the

Christie-Street Commission Company of Kansas City, to whose office, clerks, customers, etc., after that decision, the respondent company succeeded. (Rec., 544, 546.)

1. Leaving out of view for the present the Federal and Missouri anti-trust statutes, the question is, whether, under the *general law,* either petitioner or these contracting telegraph companies are under a legal duty to furnish these quotations to bucket shops. But as such duty is only co-extensive with the *right* of bucket shops to these quotations, the real question is have bucket shops such legal right.

In support of the affirmative of this question respondent's counsel contend (1) that *petitioner* may not discriminate against bucket shops, and (2) that in any event, a telegraph company may not, because it is bound, as a common carrier, to serve all alike.

Under this contract, as will be presently shown, petitioner is the real distributor of these quotations, and the telegraph companies only the agencies selected by it therefor. But as respects the question now under consideration this is immaterial. When this restriction upon distribution is imposed by the exchange, bucket shops are not, under the authorities, entitled to the quotations, either from the exchange or distributing telegraph companies.

None contends that petitioner is under any charter, or other legal duty to collect or give out these quotations. All concede that it may at any time cease doing so, as it once did for a period of two years. (Rec., 346.)

It is, however, the law of Illinois that, because

petitioner has permitted their distribution for a number of years, its quotations (being a species of property) have become impressed with a "public use" to such an extent that, if distributed at all, they must be given without discrimination to all desiring them *for lawful purposes.*

Stock Exchange v. *Board of Trade,* 127 Ill., 153.

Other courts disagree with this decision, holding that it is solely the province of the *legislature* to impress property with a "public use." (*Ladd* v. *F. C. P. & M. Co.,* 53 Tex., 172; *Delaware R. R. Co.* v. *Central Co.,* 45 N. J. Eq., 50; *State* v. *Ass. Press,* 159 Mo., 424; *Matter of Renville,* 46 App. Div., 37.) As, however, the contract at bar contemplates the distribution of the quotations to all who desire them for lawful purposes, and thus conforms to this Illinois decision, the question whether this "public use" theory is in law a correct one is not here material. Nor is it ever likely to become so. For it will always be the self interest of this, as well as every other, exchange to permit the sale of its quotations to all but bucket shops. This gives to an exchange a prominence over the other exchanges, for whose quotations there is not sufficient demand to justify their distribution. It helps to maintain petitioner's importance as a grain market.

It is, however, no longer open to question in Illinois that bucket shops are not entitled to these quotations either from petitioner or the *distributing telegraph companies.*

Central Exchange v. *Board of Trade,* 196 Ill., 396.

That case arose in 1900, and involved the contract between petitioner and one of the present distributing telegraph companies, shown on pages 242 to 246 of this record. That appellant, a bucket shop, under false pretenses and by signing one of these applications obtained petitioner's quotations, and by a bill against petitioner *and the telegraph company,* sought to enjoin their withdrawal. The trial judge decreed for the bucket shop on the ground that petitioner's quotations should be absolutely unrestricted. But the Supreme Court sustained a reversal of the case, because the quotations were by complainant used in a bucket shop, saying:

"Appellant was not entitled to any relief of that character. In this respect the case differs materially from *New York and Chicago Grain Exchange* v. *Board of Trade,* 127 Ill., 152."

In Kentucky the same rule is declared in

Smith v. *Western Union Tel. Co.,* 84 Ky., 664,

where the keeper of a bucket shop filed a bill against the *telegraph company* to compel it to continue to furnish complainant petitioner's quotations. In

Bryant v. *W. U. Tel. Co.,* 17 Fed., 825,

a bucket shop filed a bill against the *telegraph company* to prevent it from withdrawing petitioner's quotations, but the court adjudged complainant not entitled to them, because petitioner prohibited the telegraph company from furnishing them to customers of that class.

Such also is the law of New York.

In re Renville, 61 N. Y. Supp., 549, 46 App. Div., 37,

which was *mandamus* against the Western Union Telegraph Company to compel it to furnish the quotations

of the New York Stock Exchange. The defense interposed was that the exchange itself collected the quotations and furnished them to the telegraph company (as does petitioner in the present case), and that to prevent the illicit use of the quotations by bucket shops, the stock exchange required the telegraph company to first submit to it all applications for quotations, the contract, however, providing that the telegraph company might sell the quotations to all persons except bucket shops. The Supreme Court (Appellate Division, First Dept.) denied the mandamus, and added:

"An entirely different question was presented when the respondents [telegraph companies] procured the information themselves, and furnished such information to the public. It may be that under such circumstances the respondents were bound to furnish the information thus collected to all persons who were willing to comply with the conditions imposed by the respondents as a condition for rendering the services."

See, also,

Bradley v. *Western Union Tel. Co.*, 9 Cin. Law Bull., 223.

The text writers also agree that a telegraph company need not sell quotations to bucket shops.

27 Am. & Eng. Ency. of Law (2nd Ed.), 1039, 1094.

"The company may make and enforce a regulation under which it will not accept for transmission any message relating to a gambling transaction."

Telegraph companies "may lawfully refuse to furnish their instruments or reports to a gambling place, even though they may have contracted to do so, since they cannot be under an obligation to forward an illegal undertaking."

In Gray on Telegraph, 19, note, it is said:

"Assuming that a telegraph company is under an obligation of this nature [that of serving all those who choose to employ it, to the extent to which it makes a business of doing so for the public generally], it is nevertheless under no obligation to serve in this way one who intends to use the 'commercial news' for illegal purposes,—one, for instance, who carries on a 'bucket shop.' "

In Illinois, where the contract under consideration was made, and in Missouri, where the respondents transact business, their right to receive the quotations, and the duty of petitioner or the telegraph companies to furnish them, are expressly negatived by a criminal statute prohibiting any person or corporation from communicating the quotations to a bucket shops. (R. S. of Mo., 1889, Sec. 2338; Bucket-Shop Statute of Ill., Rec., 994.)

As already indicated, it makes no difference in the application of this principle of law, if the telegraph companies be regarded as purchasers of this news from petitioner. It is true that some courts hold that the duty of a common carrier, like a telephone company, to serve all alike, cannot be lawfully restricted by a contract of purchase of *apparatus used in its service as a common carrier.* Such is *State* v. *Bell Telephone Co.,* 23 Fed., relied on by respondents, the contrary view being ably presented in *American Telegraph Co.* v. *Connecticut Tel. Co.,* 49 Conn., 352.

But while a telegraph company is doubtless in a sense a common carrier as respects the transmission of messages for hire, there is nothing in the character of

a common carrier, which prevents one from also engaging in other business. A railroad company is not a common carrier as respects a coal business transacted by it. The Pullman Company, though a common carrier in its sleeping-car service, is not required to serve all alike in its business of manufacturing and selling cars. Why, then, should a telegraph company, as respects its purchase and sale of news, be regarded as a common carrier? It must purchase the news upon such conditions as the seller may lawfully impose.

Any other rule would impose upon such companies an unreasonable restriction, as this case shows. All concede that petitioner is not obliged to sell this news at all. For eight months these telegraph companies endeavored to get this news from it without restriction, and in doing so, deprived during that time the entire public of these quotations. Being, however, obliged to choose between accepting them on these terms, and not getting them at all, they wisely accepted petitioner's terms and thus were enabled to thereafter furnish the quotations to the many persons throughout the country who desired them for lawful purposes. Why may not, then, these dealers in this news, even though common carriers in other branches of their business, in order to get the news to distribute, agree that they will comply with such conditions respecting sale as *petitioner may lawfully impose.*

Petitioner and the telegraph companies having then the right to withhold the quotations from bucket shops, clearly may establish such reasonable regulations re-

specting their distribution as will effectuate this purpose. In

Sullivan v. *Postal Tel. Cable Co.*, 123 Fed., 411,

the Circuit Court of Appeals (7th Cir.) expressly held that it is "a reasonable regulation to require the applicants to sign the contract" or application here in controversy. Otherwise the restriction against bucket shops would be incapable of enforcement.

Nor can it be material whether petitioner, or the telegraph company, upon the receipt of the application, verifies its recitals by investigation. One or the other must primarily do so. The machinery adopted for doing so is the only feasible one. The contract contemplates that petitioner shall make this investigation in good faith. An arbitrary refusal of an application is not contemplated by the contract, but would violate it. The contract does not, as counsel claim, make petitioner the sole or arbitrary judge of those entitled to the quotations. The validity of the contract is to be tested by what it authorizes, and not by what it impliedly prohibits.

Hence this contract, in prohibiting the distribution of these quotations to bucket shops, does not violate any general principle of law.

2. Counsel next contend that it violates the Sherman Anti-trust Act. (1 Sup. R. S., 762.)

The first step here is to ascertain the real essence of the arrangement between petitioner and the telegraph companies for the distribution of these quotations.

Four telegraph companies are receiving and distributing the quotations,—the Cleveland Telegraph

Company, a small local company, distributing the quotations only in Chicago, and, therefore, engaged in no interstate commerce; another small company, which distributes the quotations only in Milwaukee (Rec., 246), with each of whom petitioner has made a separate contract, and the two general telegraph companies, the Western Union and the Postal Telegraph-Cable, with whom a joint contract has been made. As only the two latter companies serve the territory of respondents, or any of the defendants in pending suits, the real relation of petitioner to the distribution of these quotations may here be determined from its contract with these two large companies. (Rec., 10.)

While there are one or two phrases of this contract that indicate a *sale* of these quotations to the telegraph companies, when the contract is considered in its entirety, it will be found that petitioner is the real distributor of these quotations and employs the telegraph companies as its agencies in their distribution. The contract provides (1) that petitioner shall collect the quotations and give them to these telegraph companies; (2) that each company shall take from each applicant a contract, in which he stipulates with that company and the "*Board of Trade of the City of Chicago,*" respecting the use of the quotations; (3) that such quotations are to be transmitted to the applicant only after petitioner has had time to investigate, and has acted upon the application, and (4) that petitioner may, within the limitation of the contract, require that an applicant shall cease to receive the quotations.

In legal effect this is a contract by which the telegraph companies, as carriers, agree to transmit this

news for petitioner to certain persons to be designated by it, and accept from petitioner as compensation for such service all that can be realized from the quotations in excess of $30,000 per year, these telegraph companies jointly guaranteeing that such distribution shall net petitioner that sum.

That petitioner, and not the telegraph company, was the real distributor of the quotations, is the view taken in

Stock Exchange v. *Board of Trade,* 127 Ill., 153,

where the telegraph company paid petitioner $9,000 per year for its quotations, and the latter through its employes collected the quotations upon its exchange—as it does at present—and indicated to the telegraph company the persons, to whom the quotations were to be sent, and the court, although the telegraph company was also a defendant, treated petitioner as the distributor of the quotatations, as is apparent from the following extract of the opinion (p. 166):

"We do not wish to be understood as holding that the Board of Trade is bound, by law, to continue the business of collecting, and furnishing to the public, market quotations, or that it may not voluntarily abandon such business; but we hold, that so long as it continues to carry it on, either directly or indirectly, it must do so without unjust discrimination as to persons, and must furnish market quotations to all who may desire to obtain them for lawful purposes, and upon the same terms."

This is the view also taken in

Bryant v. *Western Union Tel. Co.,* 17 Fed., 826.

Wilson v. *N. Y. Commercial Tel. Co.*, 3 N. Y. Supp., 633.

In re Renville, 61 N. Y. Supp., *supra* (already cited).

In this view the Sherman Act has no application here. The sale of these quotations to persons outside of Illinois is doubtless interstate commerce, because delivery of the quotations starts in one state (Illinois) and ends in another. That law provides:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. * * *

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, * * * shall be deemed guilty of a misdemeanor * * *."

But that act does not require an owner to sell his property, nor prescribe the persons to whom he shall sell it, nor compel him to sell to all because he sells to some. In a sense one enjoys a monopoly through the ownership of property, whenever it is different in kind from all property owned by others. In this sense petitioner enjoys a legal monopoly of its quotations, because there are none others like them. This also is the only kind of monopoly that Congress has conferred on a patentee.

But this is not the kind of monopoly that the Sherman Act aims to prevent, as is well shown in

Whitwell v. *Continental Tobacco Co.*, 60 C. C. A., 290, 125 Fed., 454,

where a corporation manufacturing tobacco, through

its selling agent, refused to sell to those who desired to purchase, on terms that would be profitable to them, unless they refrained from dealing in the goods of the company's competitors, and this was claimed to violate the Sherman Act. But the Circuit Court of Appeals (8th Cir.) held otherwise, saying:

"The tobacco company and its employe were not required, like competitors engaged in public or quasi-public service, to sell to all applicants who sought to buy, or to sell to all intending purchasers at the same prices. They had the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales of the same commodities to different persons."

Hence petitioner, being the owner of and itself distributing these quotations, does not, by refusing to sell to bucket shops, contract, combine, or conspire in restraint of trade, nor attempt to monopolize trade within the meaning of this anti-trust act.

Nor, if the telegraph companies be regarded as the purchasers of these quotations, would this contract violate that act.

That "competition is the life of trade" has always been a maxim of the common law. From this has resulted the hostility which that law has always manifested to what have come to be known as contracts or combinations in "restraint of trade." The law on this subject was in 1711 so elaborately reviewed by Parker, C. J., in *Mitchel* v. *Reynolds*, 1 Peere Williams's Rep., 181, that this case has frequently been said to be the foundation of the rule. Many of the minor reasons there given for this principle have become obsolete, leaving as its real basis the purpose to preserve free competition in trade.

The cases to which this common law principle has been applied are all cases where one has agreed not to pursue a particular calling or profession, or conduct a particular business, or cases involving contracts, whose tendency or effect was to reduce the number of competitive buyers or sellers of property or services; in short, contracts whose tendency or effect was *to lessen or eliminate competition among different persons.*

No case, we think, will be found where the principle has been held to impair the right of an owner of property to impose upon a purchaser from him the same restrictions on subsequent sales which such owner, in selling, might himself observe. An owner of property—who is under no legal duty to sell at all, and may refuse to sell to a certain class of persons as well as fix the price at which to sell,—may also in selling to another, impose the same restrictions upon the latter's selling, without making the transaction an illegal restraint of trade at common law.

Elliman v. *Carrington,* L. R., 1901, 2 Chcy. Div., 275.

There manufacturers of goods restricted the price at which retailers should sell them, and the court held this not an illegal restraint of trade, saying (p. 278):

"But it is necessary to see what the contract really is. * * * They [the manufacturers] are not bound to sell the embrocation at all; they are not bound to manufacture it. They are at liberty to do as they please, and when they have manufactured it they are at liberty to sell it at whatever price they choose to fix—it may be a prohibitive one, or it may be such a small price that they cannot make any profit out of it. * * * Why should not Messrs. Elliman be at liberty to fix the price in that way? * * * It is

said that it is in restraint of trade. In one sense it is, but it is just as much and no more in restraint of trade for Ellimans to say that they will not sell at all. It seems to me that what is restraint of trade as regards Carrington & Son is really the liberty of trade as regards Ellimans. * * * It is merely a question whether a man is entitled when he is selling his own goods to make a bargain as to the use to be made of them by the purchaser. It is said the contract is against public policy; but that phrase merely embodies, for the present purpose, the great principle of restraint of trade, and to say that it is to prevent Messrs. Elliman from exercising their own discretion seems to me to be applying a well settled principle of law to facts to which it cannot have any possible application."

Fowle v. *Park,* 131 U. S., 88,

where this court adjudged not an illegal restraint upon trade a contract between the owner of a patent medicine and several purchasers from him, which provided that each of the latter should confine his sales to a certain territory, and all should maintain a certain price.

Bement v. *National Harrow Co.,* 186 U. S., 70,

where contracts in which a patentee restricted the price, at which his licensee should sell, prohibited the licensee from making similar implements under other patents, and granted an exclusive license, were held not to violate the act of Congress. This court said:

"That statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. * * *

The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture

and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

The fact that in these cases the property arose out of patents adds nothing, as the exclusive proprietorship conferred by the patent laws can in the nature of things be no greater than petitioner's exclusive ownership of its quotations.

These cases seem conclusive that this contract does not, in requiring the telegraph companies to withhold the quotations from bucket shops, violate this act of Congress.

If it be the law, which we deny, that such conditions by a patentee or other owner must be reasonable, still this contract is not illegal, because it certainly is reasonable to confine the quotations to lawful traders.

Nor is the principle varied by the fact that the purchaser is a common carrier, because, as already shown, a common carrier is under no legal duty to furnish these quotations to bucket shops.

For other reasons this act does not apply here. Under the common law, as already shown, all restrictions were not, in a legal sense, "restraints upon trade." The latter were only such as arrested the operation of the general law of competition. They became a well defined class of trade restrictions, and did not, as already shown, include such restrictions as the contract at bar contains.

As said by the Chief Justice (156 U. S., 16):

"It was in the light of well-settled principles that the act of July 2, 1890, was framed."

And by Justice Harlan (193 U. S., 338):

"The rule of competition prescribed by Congress was not at all new in trade or commerce."

The purpose of that act was to render more effective, in interstate and international commerce, the common law rule of free competition. While the common law distinction between reasonable and unreasonable "restraints of trade" seems to be done away with, there is nothing, either in the act or in this court's decisions under it, to justify the claim that its purpose was to change the *kind* or *class* of contracts which fall within the definition of a "restraint of trade." In all the cases in which this court has held the act applicable, the necessary tendency of the restriction was to deprive the public of the advantages that flow from free competition.

As said by this court in

Hopkins v. *United States,* 171 U. S., 578, 600,

"The act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it."

This court also said in

Anderson v. *United States,* 171 U. S., 604, 615,

"Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the

agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. As is said in *Smith* v. *Alabama*, 124 U. S., 465, 473: 'There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations.' The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and *bona fide* purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise, there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void."

To the same effect is

United States v. *Joint Traffic Assn.*, 171 U. S., at page 568.

The only purpose of the act, as appears by its title, is to protect *trade and commerce.* It only denounces restraints of, or attempts to monopolize, trade or commerce. It is neither the purpose nor the effect of the contract at bar to place any restraint upon trade or commerce. The restriction, when entirely effective, will not lessen the volume of legitimate commerce. It will only prevent the use of petitioner's quotations in gambling. *Gambling is not commerce.* The interstate commerce clause of the constitution, upon which

this Sherman Act rests, aims to "protect interstate commerce, but does not protect interstate gambling," as said in

Alexander v. *State,* 86 Ga., 246,

in upholding a statute prohibiting bucket shops against a claim that it encroached upon the power of Congress to regulate interstate commerce.

How, then, under these rules for construing this act can a contract preventing the sale of quotations to bucket shops be deemed within this act an illegal restraint of trade? Such is not its purpose or effect. It only seeks to fairly and reasonably regulate, in a way to promote the public good, the distribution of these quotations.

If the intent of Congress, in passing this act was to require the sale of these quotations to bucket shops, then *statutes,* as well as contracts, which conflict with it in interstate commerce, are condemned. State criminal statutes, like those of Illinois and Missouri, which prohibit the distribution of quotations to bucket shops within the state, are nullified whenever the transmission is interstate.

These statutes were in force when the Sherman Act was passed. They promote public welfare. They were passed in the exercise of the state's police power. Doubtless that power must yield, when necessary, to the paramount power of Congress to regulate commerce; but this court should not, in the absence of clear language, assume that Congress intended by this act to nullify these state statutes, if indeed it lawfully might do so. (*Sherlock* v. *Alling,* 93 U. S., 99; *Plumley* v. *Massachusetts,* 155 U. S., 461; *Patterson* v. *Ken-*

tucky, 97 U. S., 501; *Nashville Ry.* v. *Alabama*, 128 U. S., 96; *Hennington* v. *Georgia*, 163 U. S., 299.)

Is it not a more reasonable construction of this act that Congress did not intend to cover this subject or invade this field at all, and that states may still, under their police power, prevent the transmission of quotations into a state for use there in a bucket shop?

If that be so, then clearly this contract does not violate this anti-trust act; for it only, as respects states like Illinois and Missouri, requires the telegraph companies, in the distribution of the quotations, to obey the criminal laws of the state.

Hence Judge Hook was right in holding, as he did (Rec., 972), that the contract at bar does not violate this anti-trust act.

3. Nor does it violate the Missouri anti-trust act for the same reasons ,and for the further reason that this Missouri statute should be construed with this other Missouri statute, which prohibits the communication of quotations to bucket shops. These acts cannot both be given effect, if the anti-trust act be held to require the giving of quotations to bucket shops.

It is therefore respectfully submitted that the order of the Circuit Court of Appeals should be reversed, and the decree of the Circuit Court be affirmed.

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